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The Regulators

John D. O'Reilly Jr

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BOOK REVIEW

The Regulators. By Louis M. Kohlmeir, Jr., Harper & Row, 1969. Pp. xi, 339.

This book sets out to be the spearhead of a crusade for protection of consumers' economic interests, a critique of inefficient government administration, and a model for the structuring of government organization. Written by an experienced journalist with a felicitous literary style, and relating various episodes in several federal agencies, it is designed to convey the impression that the entities chosen by Congress to carry the regulatory statutes into execution are so mutually confused and internally incompetent that the purposes of the laws are frustrated.

The author's main targets are the "so-called" independent agencies. They are said to work at cross purposes with the conventional executive branch and with one another. They are biased toward the interests of those whom they are supposed to regulate, and unduly susceptible to selfish suggestions of influential members of Congress. The remedy for this sad state of affairs is abolition of the agencies and transfer of their policy-making functions to the President, and of their adjudicatory functions to specialized courts in some instances, and to the existing federal courts in other situations.

Basically, the author is presenting a thesis of a simplistic separation-of-powers organization of government proposed in one form or another in the 1930s and the early 1940s. The Brownlow Committee of 1937 advocated creation of twelve cabinet departments among which all administrative functions would be distributed.¹ Each department would contain a completely independent section to perform adjudicative functions. In Great Britain, the Committee on Ministers' Powers advocated that the rule-making functions be retained in the various ministries, but that the adjudicative functions be transferred to the ordinary courts.² A special committee of the American Bar Association suggested that the adjudicative functions of all agencies be lodged in a hybrid administrative court with panels of specialists in various areas.³ A modification of this approach to government structure had a brief renaissance in 1959 when Mr. Louis J. Hector, upon his resignation from the chairmanship of the Civil Aeronautics Board, submitted a memorandum to President Eisenhower.⁴ The author refers to this mem-

¹ President's Comm. on Administrative Management, Report of the Committee With Studies of Administrative Management in the Federal Government 1-58 (1937).

² Committee on Ministers' Powers Report, Cmd. No. 4060 (1932).

³ For a discussion of this proposal and other related issues, see Cooper, *The Proposed United States Administrative Court*, 35 Mich. L. Rev. 565 (1937); Landis, *Crucial Issues in Administrative Law—The Walter-Logan Bill*, 53 Harv. L. Rev. 1077 (1940); O'Reilly, *The Federal Administrative Court Proposal: An Examination of General Principles*, 6 Fordham L. Rev. 365 (1937).

⁴ Hector, *Problems of the CAB and the Independent Regulatory Commissions*, 69 Yale L.J. 931 (1960).

orandum, and apparently drew much of the inspiration for his thesis from it.⁵

A constant theme running throughout the book is that the independent agencies have, in one way or another, allowed themselves to be diverted from their assigned task of protecting consumer interests. Such criticism is based upon the undocumented assumption that consumer welfare is the direct statutory responsibility of the agencies. Such an indiscriminate generality could not be documented. While it is undoubtedly true of all legislation that it is presumably designed to promote the general welfare, it should be self-evident that, for example, the Federal Trade Commission's concern with consumer interests is much more direct and immediate when it is conducting proceedings under the Fur Products Labeling Act⁶ than when it is acting under the Federal Trade Commission Act.⁷

Apart from the author's questionable assumptions, the material he presents in support of his adverse criticism of the agencies is less than convincing. For example, the adverse evaluation of the Federal Communications Commission is based largely, though not entirely, upon the scandalous episode involving Commissioner Richard A. Mack and the award of the Miami Channel 10 television franchise, and upon the fact, presented with innuendoes, that Austin, Texas is the largest American city with but a single VHF television station, and this is owned by Mrs. Lyndon B. Johnson.

Nor is the author's appraisal of specific events always knowledgeable. In chiding the Federal Trade Commission for "preoccupation with trivia," he cites the case of the zealous staff member who commenced a proceeding under the Fur Products Labeling Act against a manufacturer of denim overalls which bore the label, "Red Fox." However, he lumps into the same category the proceeding against the parties involved in the television commercial which supported a claim that the advertised shaving cream would facilitate the shaving of sand off sandpaper by picturing a razor scraping sand from a sheet of plexiglass.⁸ The fact of the matter is that the latter case established the important principle that the Commission has authority to issue orders of very wide scope against a manufacturer and its advertising agency forbidding false or misleading advertising of products.

Unquestionably, it is important that the interests of consumers receive maximum legal protection. But failure to realize this ideal results more from deficiencies in the substantive laws than from the shortcomings of administrators of existing laws. Congress is aware of this and has passed legislation to minimize some of the deficiencies. In very recent years it has enacted such statutes as the National Traffic

⁵ He fails, however, to present the arguments against such an approach. See, e.g., Kintner, *The Current Ordeal of the Administrative Process: In Reply to Mr. Hector*, 69 *Yale L.J.* 965 (1960).

⁶ 15 U.S.C. § 69 et seq. (1964).

⁷ 15 U.S.C. §§ 41 et seq. (1964).

⁸ *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965).

and Motor Vehicle Safety Act of 1966,⁹ the Fair Packaging and Labeling Act,¹⁰ and the Truth in Lending Act.¹¹ Other comparable legislation is under consideration. Admittedly there are shortcomings in the administrative agencies. But in order to correct them one must first identify them in a more meaningful way than the shotgun method utilized by Mr. Kohlmeir. Experience has shown that there are effective ways of analyzing the problems and devising remedies.

Perhaps the first comprehensive study of the operation of government agencies was conducted by the Attorney General's Committee on Administrative Procedure. This body, composed of representative members of the bench, the bar, the law schools and government service, surveyed in depth the structure and the work of the federal administrative bodies. Its 1941 report, supported by staff monographs containing detailed examination of the work of individual agencies, led, after a war-caused delay, to the Administrative Procedure Act of 1946.¹²

More recently, a comprehensive re-examination of government administration, focusing upon the work of the principal independent agencies, was conducted at the instance of the late Speaker Sam Rayburn by a special House Committee on Legislative Oversight. For continuing surveillance of agency operations, there has been established the Administrative Conference of the United States,¹³ not yet adequately funded, but with at least a chairman and the nucleus of a permanent staff. Also, a subcommittee of the Senate Judiciary Committee, the Subcommittee on Separation of Powers, conducts in-depth studies of the current work of selected agencies. It is to this process of laborious collection of detailed facts and expert opinions, rather than to a process of relating interesting anecdotes, that we must look for ongoing improvement in the administration of the laws.

JOHN D. O'REILLY, JR.
Professor of Law
Boston College Law School

⁹ 15 U.S.C. § 1381 et seq. (Supp. IV, 1969).

¹⁰ 15 U.S.C. § 1451 et seq. (Supp. IV, 1969).

¹¹ 15 U.S.C. § 1601 et seq. (Supp. IV, 1969).

¹² 5 U.S.C. § 1001 et seq. (1964).

¹³ 5 U.S.C. § 1045 et seq. (1964).